Supreme Court, U.S.
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No. 93-622

In the

Supreme Court of the United States

October Term, 1993

CLYDE BELLECOURT,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FOR RESPONDENT DR. ALAN WYNNE

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an Eighth Amendment claim against a doctor under ***Estelle v. Gamble*** is properly dismissed where the plaintiff offers no evidence to establish the requisite culpable state of mind?

2. Whether the district court properly dismissed a pendent state law medical malpractice claim for failure to supply expert affidavits as required by Minn. Stat. § 145.682?

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STATEMENT OF THE CASE

Petitioner Clyde H. Bellecourt commenced this lawsuit on September 18, 1989, naming as defendants a number of parties, including Dr. Alan Wynne. Appdx. 105. Bellecourt's claims against Dr. Wynne center around the allegation that Dr. Wynne failed to diagnose a myocardial infarction, or heart attack, on the single occasion when Dr. Wynne examined Bellecourt on September 16, 1987. Appdx. 136-37.

On September 16, 1987, Dr. Alan Wynne was working as the overnight on-call physician for the Federal Medical Center in Rochester, Minnesota.[1] Shortly after midnight, Bellecourt, an inmate at the Federal Medical Center, called for medical help, complaining of chest pain. Appdx. 179. Dr. Wynne was summoned and responded promptly. Appdx. 179-80. He went to Bellecourt's cell, examined him, made a preliminary diagnosis of severe

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[1]The answer filed by the United States attorney on behalf of all federal defendants, including Dr. Wynne, described Dr. Wynne as "an employee of the Federal Medical Center." Approximately a year later, separate counsel were retained to represent Dr. Wynne because of a potential issue as to whether his status with respect to the Federal Medical Center was that of an employee or an independent contractor. Although that issue was never formally presented to the district court, the district court in its summary judgment order *sua sponte* ruled that Dr. Wynne was an independent contractor and not an employee. Dr. Wynne cross-appealed to the Eighth Circuit on this claim, but the Eighth Circuit did not reach the issue because it affirmed the judgment dismissing all claims against Dr. Wynne.

indigestion, administered treatment, and waited to make sure that treatment was working. Appdx. 180-81, 129-30. Dr. Wynne directed Bellecourt to call him again if his pain recurred. Appdx. 182. Bellecourt did not ask for Dr. Wynne to return that night. Appdx. 182-83. Bellecourt reported for sick call the following morning. Appdx. 131, 183-84. Later that morning he was diagnosed to have had a heart attack. Appdx. 186.

The essence of Bellecourt's complaint against Dr. Wynne is that Dr. Wynne did not diagnose his heart attack. In his evidentiary submissions in response to the defendants' motions for summary judgment, Bellecourt admitted that he only saw Dr. Wynne on the one occasion, that Dr. Wynne examined, diagnosed and treated him, and that Dr. Wynne advised him to call again if his chest pain recurred after Dr. Wynne's visit. Appdx. 179-82. Bellecourt admitted that he did not call again for Dr. Wynne, even though he claims he continued to experience chest pain. Appdx. 182-83. Bellecourt does not attribute his failure to resummon Dr. Wynne to anything Dr. Wynne said or did. Rather he attributes it to a fear of being placed in solitary confinement by defendant Lieutenant Friese, a prison guard. Appdx. 291.

Bellecourt commenced his action on the last possible day under Minnesota's two-year medical malpractice statute of limitations.. Along with his summons and complaint, Bellecourt filed an affidavit of counsel stating that the affidavit of expert review to support his medical malpractice claim required by Minn. Stat. § 145.682, subd. 3(a) could not reasonably be obtained before commencing the action because the statute of limitations was about to expire. On October 9, 1989, one of the defendants served Bellecourt with a demand for compliance with Minn. Stat. § 145.682. Bellecourt made no response to this demand. Nearly six

months later, on April 4, 1990, Bellecourt served a motion requesting an extension of time through June 7, 1990 to comply with Minn. Stat. § 145.682. Bellecourt never sought a hearing on this motion. The district court docket entries reveal that the motion was never filed with the court. Bellecourt's proposed extended deadline of June 7, 1990, passed without any expert disclosure by Bellecourt. At no time did Bellecourt obtain an order extending the section 145.682 time limits for filing affidavits of expert review and disclosure.

Bellecourt's first attempt to submit any affidavit disclosing experts in compliance with Minn. Stat. § 145.682 came on February 7, 1991, a week after Dr. Wynne's motion for summary judgment. Bellecourt's counsel then filed an affidavit purporting to explain why the expert affidavit had not been filed within the statutory time limits. The district court concluded that Bellecourt had neither complied with the mandatory requirements of § 145.682 nor shown excusable neglect for his failure to do so. The district court found that expert testimony would be necessary to support Bellecourt's medical malpractice claim, and accordingly dismissed the claim in its entirety. The district court further dismissed the Eighth Amendment claim against Dr. Wynne, finding that a claim of misdiagnosis or of disagreement with treatment does not amount to an Eighth Amendment violation. ***Bellecourt v. U.S.***, 784 F. Supp. 623 (D. Minn. 1992).

Bellecourt appealed from the district court's summary judgment order. The Eighth Circuit affirmed the district court's order in all respects. ***Bellecourt v. U.S.***, 994 F.2d 427 (8th Cir. 1993).

SUMMARY OF THE ARGUMENT

Both the district court and the Eighth Circuit properly found that Bellecourt's Eighth Amendment claim against Dr. Wynne must be dismissed for failure to offer any evidence that would establish the requisite culpable state of mind. Construing all of Bellecourt's evidence in the light most favorable to him, at most he has stated a claim against Dr. Wynne of medical negligence. He has utterly failed to establish the requisite "obduracy or wantonness" in Dr. Wynne's diagnosis and treatment to support a claim of deliberate indifference. Dr. Wynne's actions could be characterized as inadvertence or an error in good faith. They did not amount to either deliberate indifference to serious medical needs or a deliberate choice of an easier and less efficacious treatment.

Bellecourt's medical malpractice claim against Dr. Wynne was also properly dismissed. Bellecourt's claim that he should be excused from his noncompliance with Minn. Stat. § 145.682 on the grounds that his medical malpractice claim required no expert testimony was properly rejected by both the district court and the Eighth Circuit. A lay jury could not be expected to know what standard of care to apply to a claim of negligent failure to diagnose a heart attack, nor could they know what diagnostic testing and treatment would be medically required. Moreover, a lay jury would have no basis for assessing the elements of causation and damages without expert testimony. A lay jury must have expert assistance in order to evaluate a claim that an alleged delay in diagnosis of a heart attack caused injury or damage over and above the injury due to the heart attack itself.

REASONS FOR DENYING THE WRIT

I. The Eighth Circuit's Affirmance of Summary Judgment as to Bellecourt's Eighth Amendment Claim Is Consistent With Both the Supreme Court and Other Circuit Court Rulings: Without a Showing of Deliberate Indifference, No Claim Can Survive.

This Court recognized in ***Estelle v. Gamble***, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (citations omitted), that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' . . . proscribed by the Eighth Amendment." As the ***Estelle*** court indicated, the state of mind of the defendant must amount to deliberate indifference to support a constitutional claim. In ***Whitley v. Albers***, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986), the Court underscored the importance of the state of mind requirement for Eighth Amendment claims: "It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the [Eighth Amendment]." 475 U.S. at 319.

When this Court recently revisited the issue of the standards applicable to prisoners' Eighth Amendment claims in the context of a challenge to conditions of confinement, it again identified the critical issue as the defendant's state of mind. ***Wilson v. Seiter***, ___ U.S. ___, 111 S. Ct. 2321, 115 L.Ed.2d 271 (1991). Indeed, the majority opinion in ***Wilson*** described ***Estelle*** as a case in which the inmate's Eighth Amendment claim was rejected because he "had failed to establish that [the prison doctors] possessed a sufficiently culpable state of mind." 111 S.Ct. at 2323. Thus, the focus of an Eighth Amendment medical care claim must be on the

state of mind of the defendant, and not solely on the objective reasonableness of the care provided.[2]

Estelle and its state of mind requirement of deliberate indifference have been the touchstone of subsequent cases addressing Eighth Amendment claims based upon allegedly improper medical treatment of prisoners. For example, in ***Mendoza v. Lynaugh***, 989 F.2d 191, 193 (5th Cir. 1993), the court described the Eighth Amendment plaintiff's obligation in proving the requisite culpable state of mind: "Succinctly stated, negligent medical care does not constitute a valid section 1983 claim. Further, delay in medical care can only constitute an Eighth Amendment violation if there has been deliberate indifference, which results in substantial harm." Numerous other cases have also observed and applied the ***Estelle*** state of mind standard. *See, e.g.*, ***Whitley***, 475 U.S. at 319; ***Wilson***, 111 S.Ct. at 2323; ***Hudson v. McMillian***, ___ U.S. ___, 112 S. Ct. 995, 998, 117 L.Ed.2d 156 (1992) (appropriate inquiry on claim of failure to attend to serious medical needs is whether officials exhibited deliberate indifference); ***Durmer v. O'Carroll***, 991 F.2d 64, 69 n.13 (3rd Cir. 1993) (plaintiff is not entitled to trial on Eighth Amendment claim by presenting an issue as to whether the medical care provided was adequate; clearly there must also be an issue of fact regarding the defendant's intent); ***DesRosiers v. Moran***, 949 F.2d 15, 19 (1st Cir.

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[2]***Wilson*** distinguished between the "objective" and "subjective" components of Eighth Amendment claims by describing the former as whether an alleged deprivation was sufficiently serious and the latter as whether the officials acted with a sufficiently culpable state of mind. 111 S. Ct. at 2324. Both components are essential; neither is sufficient by itself to support a claim. *Id.*

1991) (to establish deliberate indifference under ***Estelle***, "complainant must prove that the defendants had a culpable state of mind and intended wantonly to inflict pain"); ***McGuckin v. Smith***, 974 F.2d 1050, 1060 (9th Cir. 1992) (in addition to showing the seriousness of the claimed need for medical treatment, the claimant must show a "purposeful act or failure to act on the part of the defendant").

Consistent with ***Estelle*** are those holdings that a deliberate decision "to take an easier and less efficacious course of treatment" may constitute an Eighth Amendment violation. ***Smith v. Jenkins***, 919 F.2d 90, 93 (8th Cir. 1990). These cases preserve ***Estelle's*** focus on the defendant's state of mind. For example, in ***Ancata v. Prison Health Services, Inc.***, 769 F.2d 700, 704 (11th Cir. 1985) (emphasis supplied), one of the "easier and less efficacious treatment" cases relied upon by Bellecourt, the court held:

> [t]he knowledge of the need for medical care and intentional refusal to provide that care has consistently been held to surpass negligence and constitute deliberate indifference.

Thus, the "easier and less efficacious" standard does not differ from the ***Estelle*** state of mind requirement. Rather, it requires the same thing -- namely, a showing of knowing or intentional refusal to provide needed medical care.

In evaluating whether a claim of deliberate indifference to serious medical needs has been made out, the Court has been careful not to transform the Eighth Amendment into a federal medical malpractice remedy for prisoners. "[A]n inadvertent failure to provide adequate medical care cannot be said to constitute 'an unnecessary and wanton infliction of pain' or to be 'repugnant to the

conscience of mankind.' . . . Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." ***Estelle***, 429 U.S. at 105-6 (citations omitted).

The circuits uniformly have followed this mandate. "While poor medical treatment will at a certain point rise to the level of constitutional violation, mere malpractice, or even gross negligence, does not suffice." ***Wood v. Housewright***, 900 F.2d 1332, 1334 (9th Cir. 1990). Likewise, the courts have refused to accept as rising to the constitutional level claims that amount to nothing more than a disagreement over a treatment plan. Thus, in ***Smith v. Marcantonio***, 910 F.2d 500 (8th Cir. 1990), the court held that summary judgment should have been granted dismissing the prisoner's claims: "Because Smith's complaints represent nothing more than mere disagreement with the course of his medical treatment, he has failed to state an eighth amendment claim . . .." 910 F.2d at 502. Similarly, in ***Randall v. Wyrick***, 642 F.2d 304, 308 (8th Cir. 1981), the court held: "Appellant's difference of opinion over matters of expert medical judgment or a prescribed course of medical treatment fails to state a federal constitutional question."

Here, Bellecourt argues that the Eighth Circuit's opinion in this case departs from settled precedent by "abandoning the 'easier and less efficacious' standard," thereby placing the Eighth Circuit in conflict with this Court and with other circuits. Petition at 20, 23. Contrary to Bellecourt's argument, the Eighth Circuit's opinion does not conflict with ***Estelle*** or any of its progeny. Both of the lower courts properly focused on the state of mind requirement to determine whether Bellecourt had offered any evidence that Dr. Wynne was deliberately indifferent to Bellecourt's

medical needs or had made a deliberate decision to take an easier and less efficacious course of treatment.

As summarized in his petition for writ of certiorari, Bellecourt's Eighth Amendment claim against Dr. Wynne reduces to a single assertion: that Dr. Wynne should have ordered an electrocardiogram in order to rule out the possibility that Bellecourt's chest pain was caused by a cardiac problem. Petition at 15. Bellecourt characterizes Dr. Wynne's diagnosis and treatment of severe indigestion as an "easier and less efficacious treatment" than an electrocardiogram.

The sole evidence identified by Bellecourt in support of his position that Dr. Wynne deliberately decided to use an easier and less efficacious treatment is Dr. Wynne's own statement to the Bureau of Prisons. Petition at 12-13 n.2, citing Appdx. 264-65. Contrary to Bellecourt's argument, the only fact established by Dr. Wynne's statement is that Dr. Wynne had no deliberate indifference toward Bellecourt. He did not prescribe an antacid for Bellecourt knowing that Bellecourt was undergoing a heart attack and that the antacid would do no good; he prescribed it because he believed Bellecourt was experiencing indigestion. He did not deliberately decide to refrain from ordering an electrocardiogram knowing that Bellecourt was in cardiac distress and that an electrocardiogram was immediately necessary; instead he decided to see if the antacid would work. He did not abandon Bellecourt without treatment;[3] he

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[3]Contrary to Bellecourt's argument, his expert did not opine that "Dr. Wynne's behavior constituted an abandonment of treatment." *Compare* Petition at 29 *with* Appdx. 340.

prescribed treatment and directed Bellecourt to call him again if his chest pain did not resolve. If Bellecourt's chest pain recurred, Dr. Wynne planned to order an electrocardiogram then.

Bellecourt's Eighth Amendment claim against Dr. Wynne foundered on the absence of any evidence of culpable intent on Dr. Wynne's part. In contrast, the cases relied upon by Bellecourt had strong evidence of "unnecessary and wanton infliction of pain" by the defendant medical providers to establish the culpable state of mind required by ***Estelle*** and ***Wilson***. For example, in ***Miltier v. Beorn***, 896 F.2d 848 (4th Cir. 1990), a wrongful death action on behalf of a prisoner who died of a heart attack while in prison, the evidence showed that the defendant doctor made no effort to follow up on his own recommendation that Miltier be transferred to a cardiology unit, but instead moved him to the general population. In ***Boretti v. Wiscomb***, 930 F.2d 1150 (6th Cir. 1991), the plaintiff's evidence indicated that the defendant nurses failed and refused to carry out the specified medical plan for care of the plaintiff's wound, by refusing to provide clean bandages or the prescribed medications. In ***Ortiz v. City of Imperial***, 884 F.2d 1312 (9th Cir. 1989), the plaintiff's evidence showed that the prison medical staff knew of the deceased prisoner's head injury, but willfully disregarded his complications and prescribed contraindicated sedatives.

The failure of Bellecourt's proof places his claim in the same category as that of the plaintiff in ***Estelle***, which this Court held did not meet constitutional muster:

> [T]he question of whether an X-ray -- or additional diagnostic techniques or forms of treatment -- is indicated is a classic example

> of a matter for medical judgment. A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment.

429 U.S. at 107. Bellecourt's claim that Dr. Wynne should have ordered an electrocardiogram, like that of the plaintiff in ***Estelle***, boils down to nothing more than a quarrel with Dr. Wynne's diagnosis and treatment. It does not raise a question as to deliberate indifference sufficient to withstand a motion for summary judgment.

Furthermore, contrary to Bellecourt's assertion, the Eighth Circuit and district court did not engage in improper fact finding when they dismissed his Eighth Amendment claims. Rather, both courts performed their required task under Rule 56 of the Federal Rules of Civil Procedure: to determine whether, on the evidence presented by the parties, any genuine issue of material fact existed. Both courts concluded, as to Dr. Wynne, that Bellecourt had failed to offer evidence that Dr. Wynne's conduct toward Bellecourt was anything more than negligent.

Lastly, it is Bellecourt, not respondents, who asks this Court to depart from its own precedents. By focusing his argument on the objective reasonableness of Dr. Wynne's medical judgment instead of on Dr. Wynne's subjective intent, Bellecourt in effect is asking this Court to reject its holdings in ***Estelle***, ***Whitley***, and ***Wilson*** that the hallmark of an Eighth Amendment claim is the defendant's culpable state of mind. Bellecourt would remove the deliberateness from the deliberate indifference standard. Bellecourt could not prove that his claim against Dr. Wynne could amount to anything more than mere negligence, and as shown below, he lost his chance to present a medical malpractice claim by his

failure to satisfy the applicable statutory requirements. He should not be permitted to resurrect that claim by transforming it into a constitutional claim. As this Court emphasized in ***Estelle***, "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner." 429 U.S. at 106.

II. The Lower Courts Properly Found that Bellecourt Must Have Expert Testimony to Support his Medical Malpractice Claim Against Dr. Wynne.

In his petition for writ of certiorari, Bellecourt's only quarrel with the dismissal of his medical malpractice claim under Minn. Stat. § 145.682 is his objection to the lower courts' holding that he could not pursue his medical malpractice claim without expert testimony to support it. He argues to this Court, as he argued below, that a lay jury could find medical malpractice in this case without the assistance of expert testimony. Nothing could be farther from the truth. Moreover, in applying section 145.682 and the cases under it, the lower courts did not "expand" the expert testimony requirement in any way.

A. Minn. Stat. § 145.682 Establishes the Expert Affidavit Requirement Applicable to Bellecourt's Claim.

Bellecourt's claim of medical malpractice against Dr. Wynne arises under Minnesota state law, and as such must comply with the requirements established by the Minnesota legislature for such claims. *See, e.g.*, ***Oslund v. United States***, 701 F. Supp. 710, 713-714 (D. Minn. 1988) (compliance with Minn. Stat. § 145.682 is necessary in any malpractice claim under Minnesota law, whether in federal or state court). *See also* ***Chizmadia v. Smiley's Point Clinic***,

873 F.2d 1163 (8th Cir. 1989) (discussing section 145.682 as it applies to medical malpractice diversity actions in federal court); ***Vakil v. Mayo Clinic***, 878 F.2d 238 (8th Cir. 1989) (same).

Section 145.682 has two affidavit requirements, one to be met at the very outset of a medical malpractice case and another to be met within 180 days later. First, subdivision 2(1) of the statute requires that an affidavit of expert review, as described in subdivision 3 of the statute, must accompany the service of a medical malpractice summons and complaint. Second, subdivision 2(2) requires that an additional affidavit of expert disclosure, as described in subdivision 4 of the statute, must be served no later than 180 days after commencement of the lawsuit.

The initial expert review affidavit must state that before commencing the lawsuit, plaintiff's counsel reviewed the facts of the case with an expert who is of the opinion that one or more defendants deviated from the applicable standard of care and thereby injured the plaintiff. Minn. Stat. § 145.682, subd. 3(a). Alternatively, the plaintiff's attorney may state that the required expert review could not be obtained in time because of the statute of limitations. *Id.*, subd. 3(b). However, a plaintiff's attorney who elects this latter option must still within 90 days serve an affidavit of expert review. *Id.* Bellecourt served along with his summons and complaint an affidavit asserting that due to the press of the statute of limitations, he could not obtain the expert review necessary under section 145.682 before commencing the action. Under subdivision 3(b), the extended due date for Bellecourt's affidavit of expert review was December 18, 1989. He did not serve it until February 7, 1991, more than a year late.

In the subsequent expert disclosure affidavit, required within 180 days after commencement of suit, plaintiff's counsel must identify each expert to be called at trial, disclose the substance of the facts and opinions to which the expert will testify, and summarize the grounds for each opinion. Minn. Stat. § 145.682, subd. 4. Answers to interrogatories may substitute for the expert disclosure affidavit, provided they are served within the requisite 180 days and contain the required information. *Id.* In this case, Bellecourt's affidavit of expert disclosure was due on March 19, 1990. He did not serve it until February 7, 1991, nearly 11 months overdue and after Dr. Wynne's summary judgment motion had been served.

Together, the two affidavits required by section 145.682 are designed to prevent plaintiffs from initiating and pursuing medical malpractice lawsuits without the expert testimony needed to support them. "The primary purpose of Minn. Stat. § 145.682 is to eliminate nuisance malpractice suits by establishing a process where affidavits of expert review are required to verify the lawsuit's validity." ***Parker v. O'Phelan***, 414 N.W.2d 534, 537 (Minn. Ct. App. 1987), *aff'd by equally divided court*, 428 N.W.2d 361 (Minn. 1988).

Both the statute itself and Minnesota case law applying the statute warn that unexcused noncompliance with the statute will lead to dismissal of the case, exactly as Bellecourt discovered in this action. Section 145.682, subd. 6, states that noncompliance with the statute "results, upon motion, in mandatory dismissal with prejudice of each cause of action as to which expert testimony is necessary to establish a prima facie case." *See, e.g.*, ***Moen v. Mikhail***, 454 N.W.2d 422 (Minn. 1990) (where plaintiff offered no evidence to show excusable neglect for noncompliance with

Minn. Stat. § 145.682, summary judgment dismissing medical malpractice claim against defendants must be affirmed); ***Maloney v. Fairview Community Hospital***, 451 N.W.2d 237 (Minn. Ct. App. 1990) (medical malpractice claim properly dismissed for noncompliance with Minn. Stat. § 145.682).

Bellecourt does not dispute that he failed to comply with section 145.682 and that he failed to show excusable neglect for his noncompliance. His only remaining argument is that he should have been allowed to pursue his medical malpractice claim without expert testimony.

B. The Lower Courts Properly Found that Expert Testimony Would be Required to Support a Claim of Negligent Failure to Diagnose and Treat a Heart Attack.

Minnesota courts have regularly held that expert testimony is necessary in all but the most exceptional medical malpractice cases. ***Plutshack v. University of Minnesota Hospitals***, 316 N.W.2d 1, 5 (Minn. 1982), lists the elements that must be proven to establish medical negligence, and specifically states that a plaintiff must "introduce expert testimony" to demonstrate these factors:

> (1) The standard of care recognized by the medical community as applicable to the particular defendant's conduct, (2) that the defendant in fact departed from that standard, and (3) that the defendant's departure from the standard was a direct cause of [plaintiff's] injuries.

Expert testimony is particularly necessary in failure to diagnose cases, which by their very nature call for the application of expertise which a lay jury cannot be expected to have. *See, e.g.*, ***Sorenson v. St. Paul Ramsey Medical Center***, 457 N.W.2d 188 (Minn. 1990) (expert testimony needed to establish negligent failure to diagnose placentio abruptio); ***Smith v. Knowles***, 281 N.W.2d 653 (Minn. 1979) (expert testimony was "crucial" to claims of negligent failure to timely diagnose and treat eclampsia); ***Todd v. Eitel Hospital***, 306 Minn. 254, 237 N.W.2d 357 (1975) (expert testimony needed to support claim of negligent failure to diagnose a malignancy). The court in ***Todd*** explained:

> This is distinctly not the kind of case where the negligence 'speaks for itself' without expert medical opinion, such as where a surgeon leaves a sponge in the body or where there is unexplained injury to a healthy part of the body remote from the treatment area. Where, as here, the conduct of the physician involves the complexities of pathological diagnosis, we are not persuaded that nonmedically-trained jurors are competent to pass judgment.

237 N.W.2d at 361.

The Minnesota Supreme Court has summarized the cases where expert testimony has been held unnecessary in ***Miller v. Raaen***, 273 Minn. 109, 139 N.W.2d 877 (1966). The district court in ***Chizmadia*** analyzed ***Miller*** and the cases it cites as creating a "limited exception" to be applied "in the simplest of fact situations, such as when metal clips or a sponge have been left in the body after surgery, or a dentist's grinding disc has slipped and cut membranes and tissues at

the base of the tongue." 768 F. Supp. at 271. In such cases, there can be no doubt about the breach of duty or about the cause of the result complained of by the plaintiff.

Here, the requirement of expert testimony imposed by Minnesota precedent must be met. Bellecourt himself acknowledged the need for such testimony by initially filing the affidavit to extend the time for providing the affidavit of expert review. Subsequently he served a motion seeking additional time. Lastly, in response to Dr. Wynne's motion for summary judgment, he served an affidavit of expert disclosure. Each of these actions is a recognition of the need for expert testimony.

Indeed, this is the type of claim that cries for expert explanation. Ironically, to avoid the requirement of expert testimony, and presumably in an attempt to illustrate the lack of complexity of the malpractice issues presented by his claim, Bellecourt quotes at length from his own expert's belated affidavit! Petition at 43-44. Far from establishing that a lay jury could identify the standard of care and apply it on its own, Bellecourt instead has shown the need for an expert to explain and apply the applicable standard of care. For example, Bellecourt's quoted expert affidavit states that "a number of medical and surgical procedures that are available" if used during the first hours following a heart attack "can limit or reverse damage." *Id.* at 43. How is a lay jury to know what those procedures are? How can a lay jury identify or quantify damage, including pain, resulting from a heart attack as opposed to damage resulting from an alleged delay in diagnosing a heart attack? Bellecourt's expert goes on to opine that "[i]ncreased physical damage to the heart and arteries may increase the likelihood that a future episode will occur . . ." *Id.* at 44. How is a lay jury to evaluate or even find damage to the heart and arteries?

More to the point, how can a lay jury distinguish between damage to the heart resulting from the heart attack itself and damage resulting from the alleged malpractice? All of these issues would require expert testimony.

One of the cases relied upon by Bellecourt even recognizes the need for expert testimony to establish claims of this type. In ***Miltier***, 896 F.2d at 852, the court held that as to a claim for alleged failure to provide adequate cardiac care, "expert explanation is required to aid the jury in determining the threshold standard of care."

Additionally, Bellecourt erroneously argues that ***Chizmadia*** and ***Vakil*** support his position that no expert testimony is necessary. In both cases, the Eighth Circuit held that the applicability of Minn. Stat. § 145.682 was conditioned upon a finding that expert testimony was necessary. ***Chizmadia***, 873 F.2d at 1165; ***Vakil***, 878 F.2d at 239. On remand, the district court in ***Chizmadia*** even made such a finding and dismissed the plaintiff's claim. ***Chizmadia v. Smiley's Point Clinic***, 768 F. Supp. 266, 271 (D. Minn. 1991), *aff'd* 965 F.2d 647 (8th Cir. 1992). Likewise, here the district court specifically found that Bellecourt must have expert testimony to establish his claim. Accordingly, the precondition for application of section 145.682 has been met, meaning that the district court properly applied the statute to dismiss the medical malpractice claim.

Lastly, Bellecourt's argument that he should have been allowed to supply the requisite expert opinions through Dr. Wynne, medical treatises, or hospital rules is also unavailing. He failed to disclose any of these sources in his expert affidavits. Even if he had, those affidavits were untimely. Trying to resort to Dr. Wynne or these other

sources as his expert does not provide Bellecourt with an escape from section 145.682, but instead highlights his utter failure to comply with the statute. He simply cannot theorize away his failure to provide the requisite affidavits.

CONCLUSION

Bellecourt has failed to raise any issue of significance sufficient to warrant the invocation of this Court's jurisdiction or review of this case. His petition for writ of certiorari should be denied.

Respectfully submitted,

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